

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

V

MICHAEL STEPHEN EMERY,

Defendant-Appellant.

UNPUBLISHED

March 10, 2005

No. 251973

Kent Circuit Court

LC No. 02-012537-FC

Before: Schuette, P.J., and Fitzgerald and Bandstra, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of first-degree premeditated murder, MCL 750.316(1)(a), and felony murder, MCL 750.316(1)(b), arising from his participation in the fatal beating of Jerry Steinberg. Defendant was sentenced to two terms of life in prison without parole. We affirm, but remand for correction of the judgment of sentence.

Defendant first argues that the trial court erred in denying his motion for a directed verdict on the first-degree premeditated murder and felony murder charges, both as a principal and under an aiding and abetting theory. We disagree. When reviewing a trial court's decision on a motion for a directed verdict, we review the record de novo to determine whether the evidence presented by the prosecutor, viewed in the light most favorable to the prosecution, could persuade a rational trier of fact that the essential elements of the crime charged were proven beyond a reasonable doubt. *People v Aldrich*, 246 Mich App 101, 122; 631 NW2d 67 (2001).

Defendant contends that the prosecution presented insufficient evidence from which the jury could convict him of first-degree premeditated murder. The elements of first-degree murder are that the defendant killed the victim and that the killing was “willful, deliberate, and premeditated.” *People v Bowman*, 254 Mich App 142, 151; 656 NW2d 835 (2002), quoting MCL 750.316(1)(a). To show first-degree premeditated murder, some time span between the initial homicidal intent and ultimate action is necessary to establish premeditation and deliberation. *People v Gonzalez*, 468 Mich 636, 641; 664 NW2d 159 (2003). Moreover, the interval between the initial thought and ultimate action should be long enough to afford a reasonable person time to take a “second look.” *Id.*

Here, the evidence showed that defendant and the other participants left the scene and returned at least three times, beating, kicking, and stomping Steinberg each time. As the trial

court noted, defendant had the opportunity to take a second, third, or even fourth look. Further, intent can be inferred from the extent and severity of Steinberg's injuries, which included rib fractures, a lacerated liver, several areas of hemorrhage, a depressed skull fracture, and a hinge skull fracture. Dr. David Start, the forensic pathologist who performed Steinberg's autopsy, testified that hinge fractures are caused by very forceful blows or stomps, and generally cause death shortly after they are suffered. Moreover, "[k]icking a man to death can constitute first-degree murder if the clear intent to kill is present." *People v Van Camp*, 356 Mich 593, 601; 97 NW2d 726 (1959). We find that the prosecution presented sufficient evidence from which a rational trier of fact could convict defendant of first-degree premeditated murder.

Defendant also contends that the prosecution presented insufficient evidence from which the jury could convict him of felony murder. Specifically, defendant maintains that there was no evidence that he was committing another crime at the time he was "beating, assisting in the beating, or aiding and abetting the beating(s)," and that there was no evidence showing that he participated in the beatings to commit a larceny or an unarmed robbery, the predicate felonies for the felony murder conviction.

The elements of felony murder are: (1) the killing of a human being, (2) with the intent to kill, to do great bodily harm, or to create a very high risk of death or great bodily harm with knowledge that death or great bodily harm was the probable result [i.e., malice], (3) while committing, attempting to commit, or assisting in the commission of any of the felonies specifically enumerated in MCL 750.316(1)(b). *People v Carines*, 460 Mich 750, 758-759; 597 NW2d 130 (1999). To constitute larceny, the following elements must be shown: (1) an actual or constructive taking of goods or property, (2) an actual carrying away or asportation, (3) the carrying away must be with a felonious intent, (4) the subject matter must be the goods or personal property of another, (5) the taking must be without the consent and against the will of the owner. *People v Cain*, 238 Mich App 95, 120; 605 NW2d 28 (1999); MCL 750.356. The elements of unarmed robbery are (1) a felonious taking of property from another, (2) by force, violence, assault, or putting in fear, and (3) being unarmed. *People v Johnson*, 206 Mich App 122, 125-126; 520 NW2d 672 (1994); MCL 750.530.

Defendant contends that taking Steinberg's duffel bag was an "afterthought," rather than "the motivating force behind the beatings(s)." However, MCL 750.316 does not require that a murder be contemporaneous with the underlying felony; rather, it only requires that the defendant intended to commit the underlying felony at the time the murder occurred. *People v Kelly*, 231 Mich App 627, 643; 588 NW2d 480 (1998). The evidence shows that Steinberg's duffel bag was taken during the initial beating, and that it was returned to the scene during the final beating. Therefore, the taking occurred during the continuum of events that constituted the murder. The evidence also indicated that Steinberg's wallet was taken. One witness testified that defendant stated, "[w]e took the wallet but it wasn't worth it." The evidence provided a basis for inferring that defendant formulated the intent to steal from the victim before or at the time the ultimately lethal blows were inflicted. *Id.* We find that the prosecution presented sufficient evidence from which a rational trier of fact could find the elements of the predicate felonies of larceny or unarmed robbery were proven beyond a reasonable doubt.

Defendant also contends that the prosecution presented insufficient evidence from which the jury could convict him of first-degree premeditated murder and felony murder under an aiding and abetting theory. Specifically, defendant maintains that there is no evidence that he

intended to kill Steinberg, that he knew codefendants Brian Davidson or Natasha Toothman intended to kill Steinberg, or that he knew his codefendants intended to steal when he participated in beating Steinberg. The prosecution must prove the following elements to establish guilt under an aiding and abetting theory: (1) the crime charged was committed by the defendant or some other person, (2) the defendant performed acts or gave encouragement that assisted the commission of the crime, and (3) the defendant intended the commission of the crime or had knowledge that the principal intended its commission at the time he gave aid and encouragement. *Carines, supra* at 768.

The evidence demonstrated that defendant was present when Steinberg was initially beaten, and was present and a participant in the subsequent beatings. The evidence also showed that defendant caused or assisted in causing Steinberg's injuries. We find that the prosecutor presented sufficient evidence from which a rational trier of fact could find beyond a reasonable doubt that defendant either committed or aided and abetted in committing first-degree premeditated murder and felony murder.

In sum, viewing the evidence in a light most favorable to the prosecution, we find that there was sufficient evidence from which a rational trier of fact could find that the essential elements of first-degree premeditated murder and felony murder were proven beyond a reasonable doubt; therefore, the trial court properly denied defendant's motion for a directed verdict.

Defendant next argues that the trial court abused its discretion when it admitted into evidence three photographs of a comatose Steinberg that depicted his head injuries. We disagree. We review a trial court's decision to admit evidence for an abuse of discretion. *People v Katt*, 468 Mich 272, 278; 662 NW2d 12 (2003). However, decisions regarding the admission of evidence frequently involve preliminary questions of law, such as whether a rule of evidence or statute precludes admissibility of the evidence. *Id.* We review questions of law de novo. *Id.* Therefore, when such preliminary questions are at issue, we will find an abuse of discretion when a trial court admits evidence that is inadmissible as a matter of law. *Id.*

Defendant argues that the photographs were inadmissible because they do not clarify any material point in issue. Defendant contends that the photographs were not essential to prove intent because a description of Steinberg's injuries would prove an intent to kill. However, "[p]hotographs are not excludable simply because a witness can orally testify about the information contained in the photographs." *People v Mills*, 450 Mich 61, 76; 537 NW2d 909 modified 450 Mich 1212; 539 NW2d 504 (1995). All relevant evidence is prejudicial to some extent. *Id.* at 75. That a photograph is gruesome in nature does not automatically render it inadmissible: the relevant inquiry is always whether the probative value of the photographs is substantially outweighed by unfair prejudice. *Id.* at 76.

Here, the photographs were probative of the nature and extent of Steinberg's injuries; the number of blows that caused the injuries, which demonstrates intent; and to support Dr. Start's testimony about the severity of the injuries. Further, the trial court discouraged the prosecutor from offering additional photographs "of the same species," which demonstrates the trial court's recognition that excessive photographs could unfairly prejudice defendant. We find that the photographs of the victim were properly admissible, and that the trial court did not abuse its discretion in admitting them into evidence.

Defendant also argues that his two convictions of first-degree premeditated murder and first-degree felony murder arising out of the death of a single victim violates the constitutional prohibition against double jeopardy. US Const, Am V; Const 1963, art 1, § 15. We agree, as does the prosecution. We review for plain error unpreserved claims that a defendant's double jeopardy rights have been violated. *People v Matuszak*, 263 Mich App 42, 47; 687 NW2d 342 (2004). In order to avoid forfeiture of this issue, defendant must show plain error that affected his substantial rights. *Id.*

Double jeopardy is violated when a defendant is convicted of both first-degree premeditated murder and first-degree felony murder arising out of the death of a single victim. *People v Bigelow*, 229 Mich App 218, 220-221; 581 NW2d 744 (1998). However, we will uphold a single conviction for murder based on two alternative theories. *Id.* Here, a plain error occurred which affected defendant's substantial rights. *Carines, supra* at 763. Defendant was prejudiced because the error affected the outcome of the lower court proceedings, i.e., his sentence violated the constitutional prohibition against double jeopardy. *Id.* Because the error seriously affected the fairness, integrity, or public reputation of the judicial proceedings, defendant is entitled to relief on this unpreserved issue. *Id.* Accordingly, the proper remedy is to remand to the trial court to modify the judgment of sentence to specify a single conviction of first-degree murder supported by two theories: premeditated murder and felony murder. *People v Long*, 246 Mich App 582, 588; 633 NW2d 843 (2001).

We affirm, but remand for correction of the judgment of sentence. We do not retain jurisdiction.

/s/ Bill Schuette
/s/ E. Thomas Fitzgerald
/s/ Richard A. Bandstra